

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

A preliminary hearing was held in this matter on June 11, 2003. Claimant had provided respondent as well as its insurance carrier notice by certified mail that the preliminary hearing was scheduled. Both respondent and its insurance carrier received the notice on May 12, 2003, that a preliminary hearing was scheduled for June 11, 2003. Respondent and its insurance carrier did not appear at the hearing nor were they represented by counsel.

The ALJ found that notice of hearing was given to respondent. There is no indication in the briefs that respondent is challenging that notice. After concluding that notice of the hearing was given, the ALJ advised claimant's counsel that some testimony was necessary on the issues of notice, accident and claimant's status as an employee.

The record from the June 11, 2003, preliminary hearing contains the testimony of claimant together with several exhibits admitted at that hearing. Claimant testified that respondent builds glass and cement plants around the country. Claimant described his job title as a foreman and carpenter. Claimant testified: (1) he suffered a work-related injury in Holly Hill, South Carolina; (2) he was and remains an employee of respondent; (3) he gave notice of said injury to his employer; and, (4) he is in need of medical treatment for said injury. Claimant further testified that respondent's base of operations is in Hutchinson, Kansas, and his job assignments come from Hutchinson, Kansas.

Claimant was referred by respondent for treatment in Holly Hill, South Carolina, and he presented a report from Dr. Barry Katz which imposed lifting restrictions until claimant could have his hernia surgically repaired.¹ The job in South Carolina was completed and claimant returned to his home in Denison, Texas. Although claimant continues to work within his restrictions he requested a preliminary hearing to obtain the recommended hernia surgery.

At the conclusion of claimant's testimony, the ALJ commented that he would issue an order authorizing Dr. Dickson to treat claimant's hernia.

Respondent argues that because the accident did not occur in Kansas, the claimant has failed to meet his burden of proof to establish jurisdiction under the Kansas Workers Compensation Act. Because neither respondent nor its insurance carrier appeared or were represented by counsel at the preliminary hearing, this defense was not raised before the ALJ.

At the preliminary hearing the ALJ requested testimony regarding notice, the accident and claimant's status as an employee. Implicit in the award of benefits is the fact that the ALJ found the accident compensable. Again, because respondent and its insurance carrier were not present the claimant's testimony was undisputed.

¹ P.H. Trans., Cl. Ex. 2.

K.S.A. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.** (Emphasis added)

The statute mandates that the Board's consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Board in the position of attempting to decide an issue based upon an incomplete record and would deny claimant the benefit of evidence that may have been presented if he had been aware that there was a dispute as to such issue at preliminary hearing.² Consequently, the respondent's appeal is dismissed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

AWARD

WHEREFORE, it is the finding, of the Board that the respondent's appeal is dismissed and the Order of Administrative Law Judge Bryce D. Benedict dated June 16, 2003, remains in full force and effect.

IT IS SO ORDERED.

Dated this 29th day of August 2003.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

³ K.S.A. 44-534a(a)(2).